

Categorically Caged: The Case for Extending Early Release Eligibility to Inmates with Violent Offense Convictions

Jenna M. Codignotto

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES

CATEGORICALLY CAGED: THE CASE FOR EXTENDING EARLY RELEASE ELIGIBILITY TO INMATES WITH VIOLENT OFFENSE CONVICTIONS

JENNA M. CODIGNOTTO[†]

INTRODUCTION

“We don’t need to let our vision of freedom be constrained by the people who make freedom seem so impossible.”¹

Susan Farrell faced both physical and sexual abuse from her husband before he was killed in 1989.² Although Ms. Farrell maintained her innocence and urged that it was her son who killed her husband, she was convicted of first-degree murder and conspiracy charges, resulting in a life sentence without parole.³ After serving thirty years of her sentence at the Michigan Department of Corrections, Ms. Farrell’s tragic life met a no less tragic end.⁴ In April 2020, one month after COVID-19 was declared a pandemic, Ms. Farrell seized in her cell for forty-five minutes before dying from the virus.⁵ She was seventy-four years

[†] Articles Editor, *St. John’s Law Review*, J.D. Candidate, May 2022, St. John’s University School of Law; B.A., 2019, Bucknell University. Thank you to Professor Anna Roberts, my family, and my friends for their unwavering support. I am eternally grateful for all of you. Also, thank you to the *St. John’s Law Review*, especially Elena Santo and Holly Constants for all of their hard work.

¹ Micah Herskind, *Three Reasons Advocates Must Move Beyond Demanding Release for “Nonviolent Offenders,”* MEDIUM (Apr. 14, 2020), <https://micahherskind.medium.com/three-reasons-advocates-must-move-beyond-demanding-release-for-nonviolent-offenders-2e76629e7d03> [<https://perma.cc/2T8H-VYEE>].

² Kristen Jordan Shamus, *Susan Farrell, Prisoner Since 1990 in Slaying of Her Husband, Dies of Coronavirus*, DETROIT FREE PRESS (Apr. 10, 2020, 6:26 PM), <https://www.freep.com/story/news/health/2020/04/10/coronavirus-prisoner-death-susan-farrell-battered-woman/5133112002> [<https://perma.cc/SU7G-SNRF>].

³ *Id.*

⁴ *Id.*

⁵ Scott Hechinger (@ScottHech), TWITTER (May 5, 2020, 9:30 AM), <https://twitter.com/scotthech/status/1257663897420652544> [<https://perma.cc/C3SJ-UH6H>].

old, which put her at an increased risk of dying from COVID-19.⁶ Yet, Michigan Governor Whitmer refused to make inmates like Ms. Farrell—that is, inmates with violent crime convictions—eligible for early release.⁷

After COVID-19 was declared a national emergency, the Centers for Disease Control and Prevention (“CDC”) emphasized the importance of “social distancing” to slow the spread of the virus. Especially to more vulnerable groups, namely, those over the age of sixty-five and those with underlying health conditions.⁸ However, overcrowded prison settings made social distancing impossible, putting inmates at greater risk of contracting COVID-19.⁹ In fact, “incarcerated people [were] at least two-and-a-half times more likely than the general population to acquire COVID-19.”¹⁰ Consequently, prisons experienced “dramatically higher rates” of COVID-related deaths than the general population.¹¹

Given the importance of social distancing in mitigating virus-related deaths, public health experts urged states to substantially reduce their prison populations.¹² They warned that without immediate action, state prisons would face “devastation that’s

⁶ See Decl. of Robert B. Greifinger, MD, at 1, *Hassoun v. Searls*, 968 F.3d 190 (2d Cir. 2020) (2:20-cv-00409-JLR-MAT) (“People in the high-risk category for COVID-19, i.e., the elderly . . . are likely to suffer serious illness and death.”).

⁷ See Ashna Mehra, *Activists, Students Criticize the Exclusion of Michigan Prisoners from Phase 1 COVID-19 Vaccination*, MICH. DAILY (Jan. 29, 2021), [https://www.michigandaily.com/crime/public-outcry-re-evaluate-covid-19-vaccine-distribution-prisons](https://www.michigandaily.com/crime/public-outcry-re-evaluate-covid-19-vaccine-distribution-prisons/crime/public-outcry-re-evaluate-covid-19-vaccine-distribution-prisons) [<https://perma.cc/6HNM-U5CW>].

⁸ *Foster v. Comm’r of Corr.*, 146 N.E.3d 372, 382 (Mass. 2020) (“[S]ocial distancing’ . . . has been a cornerstone of the public health response to COVID-19[.]”); see *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> [<https://perma.cc/5BWY-SRBT>] (recommending putting six feet of distance between yourself and others).

⁹ Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, UNIV. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich/>; see, e.g., Mark E. Wojcik & David W. Austin, *Criminal Justice and COVID-19*, CRIM. JUST., Fall 2020, at 44, 47 (“In April 2020, three-fourths of the 1,800 inmates in a prison in Marion, Ohio, tested positive for coronavirus, making that prison the largest source of coronavirus cases in the United States.”).

¹⁰ Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV., Nov.–Dec. 2020, at 1083, 1084.

¹¹ *United States v. Spencer*, No. 04 Cr. 1156, 2020 WL 3893610, at *4 (S.D.N.Y. July 10, 2020); see Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 603 (2020) (explaining that a study of the COVID-19 death rate in prisons, when adjusted for age and sex, showed that the “death rate in the prison population was 3.0 times higher” than that of the general population).

¹² Strassle & Berkman, *supra* note 10, at 1092.

unbelievable.”¹³ As a result, a number of states worked to depopulate their prisons, although the resulting reductions were minimal.¹⁴ These small drops were not substantial enough to allow for social distancing in prisons, as many were originally operating beyond full capacity.¹⁵ Notably, inmates convicted of violent offenses—a majority of inmates in state prisons—were largely excluded from release eligibility.¹⁶

This Note argues that states’ decisions to exclude inmates with violent offense convictions from their COVID-19 early release mechanisms were based on misconceptions. To effectively depopulate their prisons and avoid more senseless deaths, states must allow for the early release of these inmates. The need for more inclusive release mechanisms is pressing because COVID-19 is predicted to continue mutating, and other similar diseases are predicted to reoccur in the future.¹⁷ Part I discusses the constitutional duty that states owe to their prisoners and how states attempted to uphold their duty in light of the pandemic, specifically through the use of early release mechanisms. Part II focuses on the misconceptions that states relied on in justifying the exclusion of inmates with violent offense convictions, as well as the deadly consequences of their exclusion. Part III urges states to enact legislation expanding early release eligibility to all inmates and uses New York Senate Bill S2144 as guidance. Legislative reform is particularly important because courts have

¹³ David Montgomery, *Prisons Are Bacteria Factories; Elderly Most at Risk*, PEW CHARITABLE TRS. (Mar. 25, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/25/prisons-are-bacteria-factories-elderly-most-at-risk> [https://perma.cc/M7PE-AFMA].

¹⁴ Emily Widra, *With Over 2,700 Deaths Behind Bars and Slow Vaccine Acceptance, Prisons and Jails Must Continue to Decarcerate*, PRISON POLY INITIATIVE (June 23, 2021), https://www.prisonpolicy.org/blog/2021/06/23/june2021_population/ [https://perma.cc/BBT8-RTHQ].

¹⁵ *Id.*; see Strassle & Berkman, *supra* note 10, at 1087 (“[T]oo few incarcerated people in the United States had been released or diverted from correctional facilities to meaningfully reduce rates of infection among those incarcerated.”).

¹⁶ Herskind, *supra* note 1; see Strassle & Berkman, *supra* note 10, at 1096 (stating that “a majority of those incarcerated in state prisons are serving time for violent offenses”).

¹⁷ See Holly Yan, *Don’t Ignore This Headline: The Pandemic Is Getting Worse. What Happens Next Is Up to You*, CNN HEALTH (Jan. 15, 2021, 3:25 PM), <https://www.cnn.com/2021/01/15/health/covid-19-pandemic-getting-worse/index.html> [https://perma.cc/93KD-D6TN]; see also Victoria Gill, *Coronavirus: This Is Not the Last Pandemic*, BBC (June 6, 2020), <https://www.bbc.com/news/science-environment-52775386> [https://perma.cc/95QM-ZLZV].

failed to find Eighth Amendment violations in cases where states refused to release inmates amid a public health crisis.¹⁸

I. BACKGROUND

A. *The Constitutional Duty States Owe to Their Prisoners Amid a Public Health Crisis*

The Eighth Amendment protects inmates against the infliction of cruel and unusual punishment and is applicable to the states through the Due Process Clause of the Fourteenth Amendment.¹⁹ The Supreme Court of the United States initially interpreted the Eighth Amendment as only protecting against barbaric and disproportionate methods of criminal punishment.²⁰ However, in *Estelle v. Gamble*, the Court extended the Eighth Amendment to protect against unconstitutional conditions of confinement.²¹

Specifically, the Supreme Court of the United States has held that unconstitutional conditions of confinement exist when a prisoner is “exposed . . . to a sufficiently substantial ‘risk of serious damage to his future health,’” and where prison officials are deliberately indifferent to that risk.²² Therefore, when a state incarcerates a person, it takes on a “corresponding duty” to protect that person’s safety and well-being.²³ This constitutional duty requires prisons “to protect inmates in their custody from the spread of serious, communicable diseases, including where the complaining inmate does not show symptoms of the disease, or

¹⁸ See Valena E. Beety & Brandon L. Garrett, *COVID-19 and Criminal Justice*, UNIV. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-intro/#intro-head> (“[T]he courts [did] little to halt the spread of COVID in carceral settings.”).

¹⁹ U.S. CONST. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 101 (1976); see also *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

²⁰ Samantha A. Moppett, *Extending Eighth Amendment Protections to Prisoners Involuntarily Exposed to Unreasonable Levels of Environmental Tobacco Smoke*—*Helling v. McKinney*, 113 S. Ct. 2475 (1993), 28 SUFFOLK U. L. REV. 200, 202 (1994).

²¹ 429 U.S. at 102, 104.

²² *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

²³ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989); see *People ex rel. Squirrel v. Langley*, 124 N.Y.S.3d 901, 908 (Sup. Ct. Putnam Cnty. 2020) (“Prison inmates’ health is the responsibility of governments who incarcerate them.”).

where ‘the possible infection might not affect all of those exposed.’ ”²⁴

B. Establishing Unconstitutional Conditions of Confinement During a Pandemic

To successfully establish an Eighth Amendment violation for conditions of confinement, an inmate must establish two elements: one objective and one subjective.²⁵ First, to satisfy the objective component, it must be shown that prison living conditions seriously deprive inmates of their basic human needs.²⁶ Second, to satisfy the subjective component, it must be shown that prison officials were deliberately indifferent to inmate health or safety.²⁷ As a result, even if prison officials are aware of a serious health threat, no Eighth Amendment violation exists unless the officials acted in a deliberately indifferent manner to that threat.²⁸

Historically, courts have held that prison officials were deliberately indifferent to a health crisis if they completely failed to take precautions to protect their inmates.²⁹ Conversely, when prison officials made efforts to protect inmates from a substantial threat of harm, courts have found no Eighth Amendment liability.³⁰ For example, in *Butler v. Fletcher*, the appellant had little trouble satisfying the objective element because tuberculosis was a known public health threat.³¹ Nonetheless, the United States Court of Appeals for the Eighth Circuit held that there was no Eighth Amendment violation because the appellant could not satisfy the subjective element.³² In that case, officials enacted “policies [that] specifically acknowledged the risk and

²⁴ *Foster v. Comm’r of Corrs.*, 146 N.E.3d 372, 379 (Mass. 2020) (quoting *Helling*, 509 U.S. at 33).

²⁵ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

²⁶ *Rhodes v. Chapman*, 452 U.S. 337, 346–47 (1981).

²⁷ *Foster*, 146 N.E.3d at 390 (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

²⁸ *See, e.g.*, *Johnson v. United States*, 816 F. Supp. 1519, 1522–25 (N.D. Ala. 1993) (holding that there was no Eighth Amendment violation for potentially exposing an inmate to HIV because officials educated the inmates on precautions and prohibited behavior contributing to the contraction of HIV).

²⁹ *See, e.g.*, *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (holding that prison officials violated inmates’ Eighth Amendment rights by failing to make any effort to screen incoming inmates for a known and highly contagious disease); *DeGidio v. Pung*, 920 F.2d 525, 533–34 (8th Cir. 1990) (holding that prison officials violated inmates’ Eighth Amendment rights by neglecting to take action to control the prison’s tuberculosis epidemic).

³⁰ *See, e.g.*, *Foster*, 146 N.E.3d at 393.

³¹ 465 F.3d 340, 345 (8th Cir. 2006).

³² *Id.*

promulgated detailed procedures for the diagnosis, segregation, and treatment of . . . inmates infected with active cases of [tuberculosis].”³³ Thus, because there was at least *some* action taken to prevent the spread of the infectious and deadly disease, the court was unable to find that the officials were deliberately indifferent to the health and safety of the inmates.³⁴

C. *State Efforts to Protect Their Prisoners from COVID-19*

There are no statutes governing how states must protect their prisoners during a public health crisis.³⁵ For that reason, efforts to protect against the spread of COVID-19 in prisons took the form of executive actions, administrative decisions, and court orders. These efforts included “amending agency policy []such as policies on visitation, hand sanitizer, copays, [and] shared spaces,” as well as “releasing certain individuals from correctional facilities prior to the completion of their sentence.”³⁶

Notably, states did not have a duty to release inmates to mitigate the deadly threat that COVID-19 posed to its prisoners.³⁷ Nevertheless, several states implemented early release mechanisms in response to the experts and health organizations that emphasized the need for “social distanc[ing]” to prevent the spread of the virus.³⁸ Although the mechanisms and enforcement of these relief efforts varied state-by-state, there were common themes, such as who was—and who was not—eligible for release.³⁹

State COVID-related early release mechanisms were nearly unanimous in their explicit exclusion of inmates with violent

³³ *Id.*

³⁴ *Id.* at 345–46.

³⁵ See Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 72 (2020) (explaining that the United States lacks a uniform mechanism to systematically release incarcerated individuals during a pandemic); *Colvin v. Inslee*, 467 P.3d 953, 962 (Wash. 2020) (“[N]o law commands the governor and secretary to release inmates.”).

³⁶ Memorandum from Bill McBride, Executive Director, to the Governors’ Offices 1 (Apr. 8, 2020) (on file with the National Governors Association). However, some states did not take any action at all. See *id.*

³⁷ See *Colvin*, 467 P.3d at 962.

³⁸ *Foster v. Comm’r of Corrs.*, 146 N.E.3d 372, 403 (Mass. 2020) (Gants, C.J., concurring) (recognizing that the World Health Organization and the United States Department of Justice agreed that states needed to reduce their prison population to protect against the spread of COVID-19); Wojcik & Austin, *supra* note 9, at 47, 48 (“Some states . . . released prisoners.”).

³⁹ Memorandum from Bill McBride, *supra* note 36.

offense convictions.⁴⁰ The exclusion of these inmates was attributed to the belief that these releases would pose a threat to public safety.⁴¹ Because of this fear, governors enacting reforms made it clear that their policies would not include inmates convicted of violent offenses.⁴² And with the exception of some advocates,⁴³ the public was supportive of governors' decisions to exclude this group of inmates from release eligibility.⁴⁴ As a result, inmates with violent offense convictions—many of whom were vulnerable to the virus—remained in prison despite the presence of a highly contagious and deadly disease.⁴⁵

Moreover, state COVID-related early release mechanisms were practically unanimous in their focus on releasing nonviolent inmates who were nearing the end of their sentences.⁴⁶ These policies were largely based on the belief that releasing inmates with nonviolent convictions would not pose a threat to public safety or result in recidivism.⁴⁷ The Rhode Island Supreme Court, for example, ordered the release of inmates with less than ninety-

⁴⁰ Mirko Bagaric et al., *The Increased Exposure to Coronavirus (COVID-19) for Prisoners Justifies Early Release: And the Wider Implications of This for Sentencing—Reducing Most Prison Terms Due to the Harsh Incidental Consequences of Prison*, 48 PEPP. L. REV. 121, 139 (2021).

⁴¹ J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1647–48 (2020).

⁴² See, e.g., John Pfaff, *The Forever Bars*, WASH. POST (Apr. 10, 2020), <https://www.washingtonpost.com/outlook/2020/04/10/prison-violent-offender-jail-coronavirus/> (explaining that the Governor of Pennsylvania said, “I have no interest—and I want to make this crystal clear—in releasing violent criminals from our system”).

⁴³ Herskind, *supra* note 1.

⁴⁴ Sarah Rankin & Denise Lavoie, *Va. Parole Grants to Violent Offenders Spark Criticism from Prosecutors, Families*, PITT. POST-GAZETTE (May 10, 2020, 6:06 PM), <https://www.post-gazette.com/news/nation/2020/05/10/Parole-grants-spark-criticism-from-prosecutors-families/stories/202005100110> [<https://perma.cc/2WC3-BT86>].

⁴⁵ Andre G. Montoya-Barthelemy et al., *COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, 58 AM. J. PREVENTIVE MED. 888, 888 (2020) (“Prisoners have a high prevalence of chronic diseases and mental health illness, and prisons house an increasingly aging population, which will contribute directly to higher rates of severe viral illness and death.”).

⁴⁶ Brandon Garrett, *Five Takeaways from Prison Actions During COVID-19*, DUKE L. CSJ BLOG (May 22, 2020), <https://sites.law.duke.edu/cs-j-blog/2020/05/22/five-takeaways-from-prison-actions-during-covid-19/> [<https://perma.cc/W5X7-JT8J>].

⁴⁷ See Colleen O’Dea, *DOC Commissioner Defends COVID-19 Care in State Prisons, Murphy Orders Release of Some Inmates*, NJ SPOTLIGHT NEWS (Apr. 10, 2020), <https://www.njspotlight.com/2020/04/doc-commissioner-defends-covid-19-care-in-state-prisons-murphy-orders-release-of-some-inmates/> [<https://perma.cc/523M-GVED>].

one days remaining of their sentences.⁴⁸ After the court issued the order, Attorney General Peter Neronha clarified that only inmates serving sentences for nonviolent offenses would be eligible for release.⁴⁹ Similarly, the Governor of Ohio only authorized the release of inmates who were convicted of nonviolent crimes and were nearing the end of their sentences.⁵⁰ Additionally, many states recognized the heightened risk that the virus posed to older and medically vulnerable inmates, which led some to adopt policies that prioritized their release, but only if they were convicted of a nonviolent offense and were nearing the end of their sentence.⁵¹

D. Lawsuits Claiming Unconstitutional Conditions of Confinement Amid the COVID-19 Pandemic

Several prisoners excluded from state-based early release mechanisms attempted to seek an order for release by claiming that their conditions of confinement were unconstitutional under the Eighth Amendment.⁵² These lawsuits were filed by medically vulnerable and older inmates who alleged that the threat posed by COVID-19 to people with their conditions and in spaces of limited distancing amounted to cruel and unusual punishment.⁵³ As

⁴⁸ Mark Reynolds, *R.I. Supreme Court OKs Release of 52 Inmates*, PROVIDENCE J. (Apr. 4, 2020, 8:47 PM), <https://www.providencejournal.com/news/20200403/ri-supreme-court-oks-release-of-52-inmates> [<https://perma.cc/37KB-2448>].

⁴⁹ *Id.*

⁵⁰ Nick Swartzell, *DeWine Authorizes Release of 105 Inmates as Coronavirus Cases in Ohio Prisons Swell into the Hundreds*, CITYBEAT (Apr. 16, 2020, 12:00 PM), <https://www.citybeat.com/news/blog/21128810/dewine-authorizes-release-of-105-inmates-as-coronavirus-cases-in-ohio-prisons-swell-into-the-hundreds> [<https://perma.cc/ESV2-4CL5>].

⁵¹ *See, e.g., 700 More Kentucky Inmates Could be Released as COVID-19 Cases Increase at Prisons*, WLKY (July 30, 2020, 1:19 PM), <https://www.wlky.com/article/700-more-kentucky-inmates-could-be-released-as-covid-19-increase-at-prisons/33471747> [<https://perma.cc/6UKN-DHJE>] (stating that the Kentucky Governor was prioritizing older and more vulnerable inmates who were nearing the end of their sentences).

⁵² *See, e.g., Cory Shaffer, Inmates Sue Gov. DeWine Over Deadly Coronavirus Outbreaks in Ohio Prisons, Seek Release of Thousands Prisoners*, CLEVELAND (May 15, 2020, 4:12 PM), <https://www.cleveland.com/coronavirus/2020/05/inmates-sue-gov-dewine-over-deadly-coronavirus-outbreaks-in-ohio-prisons-seek-release-of-thousands-prisoners.html> [<https://perma.cc/SQW9-LWP2>].

⁵³ *See, e.g., People ex rel. Carroll v. Keyser*, 125 N.Y.S.3d 484, 486 (3d Dep't 2020) (“[P]etitioner commenced this special proceeding for a writ of habeas corpus . . . alleging that his advanced age, race and underlying medical conditions left him in significant danger of serious illness and death if infected with . . . COVID-19.”); *Matter of Pauley*, 466 P.3d 245, 249 (Wash. 2020) (“[A]n inmate . . . filed a personal restraint petition . . . claiming that his conditions of confinement

mentioned above, these lawsuits required inmates to satisfy both the objective and subjective components of the two-pronged test for unconstitutional conditions of confinement.⁵⁴

Inmates bringing claims for Eighth Amendment violations had little trouble satisfying the objective component of the test.⁵⁵ For example, in *Matter of Pauley*, the Court of Appeals of Washington held that the objective prong was presumptively satisfied because “[p]ublic health experts appear to agree that incarcerated individuals are at special risk of infection,” and that “[p]risoners are more likely than the general population to report experiencing infectious diseases.”⁵⁶ Further, in *People ex rel. Carroll v. Keyser*, the New York Appellate Division held that the objective component was arguably established when “physicians . . . explained that the novel coronavirus is quite infectious and that serious outbreaks in prisons were inevitable given the close contact between individuals inherent to the prison setting.”⁵⁷

However, inmates were rarely able to satisfy the second, subjective component.⁵⁸ Because most prisons made at least *some* effort to prevent the spread of COVID-19, inmates were unable “to show that prison officials had been ‘obdurate, wonton [sic], or reckless with respect to [the risk of COVID-19], or . . . otherwise failed to take reasonable steps aimed at preventing or mitigating the risk that COVID-19 presents to those detained.’”⁵⁹ In *Matter of Pauley* and *People ex rel. Carroll v. Keyser*, the courts held that the inmates did not satisfy the subjective component and thus

violate . . . the Eighth Amendment to the United States Constitution because of the risk of harm he faces from exposure to COVID-19” and also violate a “common law duty to protect inmates’ health and safety.”)

⁵⁴ See *Matter of Pauley*, 466 P.3d at 256.

⁵⁵ See, e.g., *Foster v. Comm’r of Corr.*, 146 N.E.3d 372, 391 (Mass. 2020) (holding that the inmates satisfied the objective component “[n]otwithstanding the claim that no inmate . . . had to endure an unreasonable risk to health or safety as a result of being incarcerated during the COVID-19 pandemic, [because] there can be no real dispute that the increased risk of contracting COVID-19 in prisons, where physical distancing may be infeasible to maintain, has been recognized by the CDC and by courts across the county.”).

⁵⁶ 466 P.3d at 257.

⁵⁷ 125 N.Y.S.3d 484, 488 (3d Dep’t 2020).

⁵⁸ *People ex rel. Williams v. Brann*, No. 400147, 2020 WL 3422673, at *7 (N.Y. Sup. Ct. June 16, 2020) (“[L]ower courts have consistently found that petitioners seeking release on deliberate indifference grounds, had failed to meet their burden.”).

⁵⁹ *Foster*, 146 N.E.3d at 393 (citing *Baez v. Moniz*, 460 F. Supp. 3d 78, 89 (D. Mass. 2020)).

found no Eighth Amendment violations.⁶⁰ In *Matter of Pauley*, the court found that the Department of Corrections made an effort to protect its inmates against the threat of COVID-19 because it implemented mitigation policies, such as isolating inmates who tested positive and supplying inmates with face coverings.⁶¹ Similarly, in *People ex rel. Carroll v. Keyser*, the court could not find that the prison officials were deliberately indifferent to the threat of COVID-19 because they took protective measures by “reducing inmate population density during outdoor recreation and providing masks to all inmates.”⁶² Accordingly, as long as states had some kind of mitigation policy in place, prison officials were not found to have violated their constitutional duty to protect the health of their prisoners.

II. THE DIRE EFFECTS OF A MISGUIDED CATEGORICAL EXCLUSION

As mentioned earlier, states have rationalized their exclusion of inmates with violent offense convictions from their early release mechanisms based on public safety concerns. However, this public safety rationale was grounded in prejudicial misconceptions. Section A addresses these misconceptions and concludes that the release of some inmates with violent convictions was, in fact, consistent with the policy of maintaining public safety. Section B elaborates on the health and safety consequences that these restrictive early release mechanisms had and will continue to have if left unchanged.

A. *The Rationale for Excluding Inmates with Violent Offense Convictions Relies on Misconceptions, Not Facts*

Studies show the American people believe that inmates convicted of violent offenses are inherently violent.⁶³ Therefore, many Americans are unwilling to call for their release on the belief that they will reoffend and jeopardize public safety.⁶⁴ Further, a majority of Americans oppose the release of inmates with violent offense convictions even if they have a low risk of reoffending, which suggests that these inmates have been given a less than

⁶⁰ 466 P.3d at 258–59; 125 N.Y.S.3d at 489.

⁶¹ 466 P.3d at 259.

⁶² 125 N.Y.S.3d at 489.

⁶³ See German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You.*, VOX (Sept. 7, 2016, 11:30 AM), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll>.

⁶⁴ *Id.*

human status and warrant less compassion.⁶⁵ These beliefs, although not factually supported, are embedded in the public safety rationale that states have been using to exclude inmates with violent convictions from early release eligibility.⁶⁶ Statistics show that inmates with violent offense convictions can be released without jeopardizing public safety.⁶⁷ In fact, state refusal to consider these inmates for release actually hinders public safety, as overcrowding in prisons allows contagious diseases like COVID-19 to spread rapidly both inside and outside prison walls.⁶⁸

1. The Misconception that Inmates with Violent Offense Convictions Are Less than Human

The American people, including government officials, have long exhibited a “callous indifference to the health and safety of the incarcerated.”⁶⁹ This dismissive attitude is enhanced when it comes to the well-being of inmates with violent offense convictions and is driven by the popular belief that people who commit acts of violence are killers or rapists who lack self-control.⁷⁰ This belief can largely be attributed to the media’s portrayal of violent crime

⁶⁵ *Id.*; see Ryan J. Lofaro & Clifford McCue, *Salient Target Populations and the Subcategorization of Deviants in the Release of Inmates During the COVID-19 Pandemic*, 42 ADMIN. THEORY & PRAXIS 379, 383 (2020) (“Inmates are viewed as subhuman and thus deserving of punishment and societal exclusion . . . This is especially true when these individuals have committed violent or sex crimes.”) (citations omitted).

⁶⁶ See discussion *infra* Section II.A.1–2.

⁶⁷ Megan Denver et al., *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 672 (2017).

⁶⁸ Alice Speri, *Mass Incarceration Poses a Uniquely American Risk in the Coronavirus Pandemic*, INTERCEPT (May 6, 2020, 11:01 AM), <https://theintercept.com/2020/05/06/coronavirus-prison-jail-mass-incarceration/> [<https://perma.cc/DUQ8-TBCM>] (“As corrections facilities bec[a]me hot spots, the virus [was] also rapidly spreading into the surrounding communities.”); Dolovich, *supra* note 9 (“[W]hat happens inside jails and prisons has serious repercussions for the health of the broader community.”).

⁶⁹ Dolovich, *supra* note 9.

⁷⁰ See Michael O’Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. 1035, 1036 (2019) (“[S]tudies do indicate that public attitudes tend to be harsher toward violent than nonviolent crime”); see, e.g., Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 155 (2001) (explaining how a study showed that the public perceives rapists solely as “psychopaths lurking in dark alleys waiting” for victims to “inflict their uncontrollable desires” on) (quoting Stevi Jackson, *The Social Context of Rape: Sexual Scripts and Motivation*, in RAPE & SOC’Y 16, 16 (Patricia Searles & Ronald J. Berger eds., 1995)).

perpetrators,⁷¹ yet it is a far cry from reality and “ignores the math, misunderstands human behavior and, perhaps most important, reflects a poor moral choice.”⁷² Frequently, inmates’ violent crime convictions are based on one moment of their lives, but ultimately “each of us is more than the worst thing we’ve ever done.”⁷³

In times of crisis, the inmates’ less-than-human status has resulted in treatment even less favorable than that of animals.⁷⁴ For example, during Hurricane Katrina, a category five hurricane, the Society for the Prevention of Cruelty to Animals undertook the challenging task of evacuating the 263 animals under its care to safety.⁷⁵ And “[a]lthough the process of moving 263 dogs and cats was difficult, the decision to evacuate [them] was not.”⁷⁶ Meanwhile, government and prison officials hardly considered evacuating the inmates of Orleans Parish Prison trapped in the course of the hurricane.⁷⁷ Rather, the decision that these inmates had to be kept “where they belong[ed]” was an easy one, despite knowing that deaths were inevitable.⁷⁸ The responses to both COVID-19 and Hurricane Katrina demonstrate how people view inmates as being less-than-human and that they are blatantly disregarded, even when their lives are at stake.⁷⁹

⁷¹ See Katherine Corry Eastman, *The Progress of Our Maturing Society: An Analysis of State-Sanctioned Violence*, 39 WASHBURN L.J. 526, 536 (2000) (explaining that the media’s focus on violent perpetrators and “oppressive dehumanization” of the perpetrators, fosters the notion that they are “dispensable”).

⁷² Pfaff, *supra* note 42.

⁷³ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 290 (2014).

⁷⁴ Pfaff, *supra* note 42.

⁷⁵ NAT’L PRISON PROJECT AM. CIV. LIBERTIES UNION, *ABANDONED & ABUSED: COMPLETE REPORT 20* (2006), <https://www.aclu.org/report/abandoned-abused-complete-report> [<https://perma.cc/H7SY-WAAX>].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*; see Fergus Michaels, *New Orleans Prisoners Left to Drown After Katrina Struck*, WORLD SOCIALIST WEB SITE (Oct. 1, 2005), <https://www.wsws.org/en/articles/2005/10/katr-o01.html> [<https://perma.cc/HN42-D3V6>] (explaining that although there is no official count of the prisoners that died during the Hurricane, a report by the Human Rights Watch suggests that the number of deaths was 517).

⁷⁹ See Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL’Y INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html> [<https://perma.cc/GT9U-JDCE>] (“Because policymakers failed to take steps to prevent the spread of the virus in prisons and jails, correctional facilities topped *The New York Times* list of largest outbreaks for months.”).

2. The Misconception that Inmates with Violent Offense Convictions Are Inherently Violent and Will Commit More Crimes if Released

The state-based early release mechanisms that exclude inmates with violent offense convictions bolster the false, yet dominant, view that these inmates are violent people who will continue to commit violent crimes if released, unlike inmates with nonviolent offense convictions.⁸⁰ However, the opposite is true.⁸¹ When compared to inmates convicted of nonviolent offenses, “[p]eople convicted of violent offenses have among the lowest rates of recidivism, illustrating . . . that people who have committed a violent act are not inherently violent and can succeed in the community.”⁸²

This conclusion is reinforced by several government reports and academic studies.⁸³ For example, one study found that over a twenty-three year period, only one percent of inmates released from prisons in New York and California that had been convicted of murder or nonnegligent manslaughter were reincarcerated for a similar offense.⁸⁴ As another study pointed out:

These data are especially remarkable given that people released from prison for a violent or sexual offense face additional conditions, restrictions, and resistance from society. Any allegation—no matter how slight—will be met with the most serious response. For example, failing to report something as simple as a job or housing update can lead to revocation of parole and a return to incarceration.⁸⁵

Additionally, although not an intentional study, the Maryland Court of Appeals called for the early release of about 150 inmates after concluding that the jury instructions given in the 1970s were

⁸⁰ Denver et al., *supra* note 67, at 671 (“[T]he public perceives that individuals with violent convictions have a far higher risk of committing future crimes than do those with drug or property convictions.”).

⁸¹ *See id.* at 672; Lofaro & McCue, *supra* note 65, at 386 (“Interestingly, individuals convicted of sexual or violent crimes—those who are exempt from release—are some of the least likely to be rearrested.”).

⁸² Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL’Y INITIATIVE (Apr. 2020), <https://www.prisonpolicy.org/reports/violence.html> [<https://perma.cc/A8T7-CH5D>].

⁸³ Denver et al., *supra* note 67, at 672 (“Extant evidence from government reports . . . and academic studies . . . reveals that individuals convicted of violent crimes are *less* likely to recidivate compared with those with drug or property convictions.”) (citations omitted).

⁸⁴ Jones, *supra* note 82.

⁸⁵ *Id.*

improper.⁸⁶ Not one of those inmates—“deemed the ‘worst of the worst’”—had committed another crime or even violated parole after being released.⁸⁷ For comparison, studies of the releases of inmates with nonviolent offense convictions have revealed that more than half were reincarcerated post-release.⁸⁸

Further, “violent” is not an inherent or fixed characteristic.⁸⁹ All people are capable of change, including those once considered “violent.”⁹⁰ As one inmate stated: “Many of us who have committed violent crimes have evolved; we are no longer the mistakes we made.”⁹¹ For example, take Michael Flournoy.⁹² At the age of twenty-one, Mr. Flournoy was convicted of attempted murder after misfiring his gun and hitting a bystander in the head, causing her serious and life-altering injuries.⁹³ Despite believing he would not be released until he was in his seventies, Mr. Flournoy decided to make the most of his time in New York State prison.⁹⁴ Mr. Flournoy “earn[ed] associate’s and bachelor’s degrees from Bard College, a master of arts from the New York Theological Seminary, and certification as an A[IDS]/HIV counselor.”⁹⁵ At the age of forty-three, after spending twenty-two years in prison, Mr. Flournoy received a grant of clemency from Governor Cuomo.⁹⁶ Mr. Flournoy now spends his freedom “tutoring college students in

⁸⁶ Marc Morjé Howard, *The Practical Case for Parole for Violent Offenders*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/opinion/violent-offender-parole-sentencing-reform.html>.

⁸⁷ *Id.*

⁸⁸ Hon. William Ray Price, Jr., Chief Justice Delivers 2011 State of the Judiciary Address (Feb. 9, 2011), in 67 J. MO. B. 82, 83 (2011) (“In Missouri, 44.6 percent of nonviolent offenders are reincarcerated within two years of release; 52 percent of nonviolent offenders are reincarcerated within three years of release; and 58.5 percent of nonviolent offenders are reincarcerated within five years of release.”).

⁸⁹ See Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 60 (1993).

⁹⁰ Arwa Mahdawi, *The Case for Releasing Violent Offenders Early*, GUARDIAN (Aug. 21, 2018), <https://www.theguardian.com/us-news/2018/aug/21/clemency-case-for-releasing-violent-offenders-early> [<https://perma.cc/4QL7-AT7B>]; see Jamiles Lartey, *Can We Fix Mass Incarceration Without Including Violent Offenders?*, MARSHALL PROJECT (Dec. 12, 2019, 6:00 PM), <https://www.themarshallproject.org/2019/12/12/can-we-fix-mass-incarceration-without-including-violent-offenders> [<https://perma.cc/R935-DCRM>] (“[A]ll human beings [are] capable of evolution.”).

⁹¹ Lartey, *supra* note 90.

⁹² Mahdawi, *supra* note 90.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

writing.”⁹⁷ Not only is Mr. Flournoy an example of how people who commit violent offenses can change, but he is also an example of how they can successfully reenter and effectively contribute to society.⁹⁸

Moreover, as demonstrated by the age-crime curve, “crime tends to peak in adolescence or early adulthood and then decline with age.”⁹⁹ Thus, a majority of people convicted of crimes who may once have been considered violent “age out” of crime.¹⁰⁰ After age twenty, the age-crime curve shows a steady decrease with respect to the likelihood that a person will commit a crime.¹⁰¹ In the study of inmates with violent offense convictions released from New York and California mentioned above, “[t]he re-incarceration rate was even lower for older people: only 0.02% of people over 55 returned to prison for another murder or nonnegligent manslaughter conviction.”¹⁰² Also, a report by Families Against Mandatory Minimums (“FAMM”) revealed that older inmates are the least likely of all inmates to be rearrested or return to prison.¹⁰³

Additionally, an inmate’s physical health has a significant relationship with her rate of recidivism.¹⁰⁴ When inmates are suffering from medical conditions, they have a lower rate of recidivism than their non-medically compromised counterparts.¹⁰⁵ For example, the FAMM Report revealed that, in addition to the aging prison population, medically compromised inmates are some

⁹⁷ *Id.* Carolyn Jones, the victim that Mr. Flournoy shot, was one of the advocates for his release. *Id.*

⁹⁸ *See id.*

⁹⁹ Jones, *supra* note 82 (“The ‘age-crime curve’ can be explained in part by the fact that brain development continues well into people’s twenties, particularly in the prefrontal cortex, which regulates impulse control and reasoning.”).

¹⁰⁰ Radley Balko, *The Case for Releasing Violent Offenders*, WASH. POST (Aug. 14, 2017, 11:23 AM), <https://www.washingtonpost.com/news/the-watch/wp/2017/08/14/the-case-for-releasing-violent-offenders/>.

¹⁰¹ *Id.*

¹⁰² Jones, *supra* note 82. Another study of inmates with violent convictions in New York and California found that “only nine of about 3000 such releases resulted in new-crime reincarcerations and only three of those releases resulted in another murder or nonnegligent manslaughter sentence.” Prescott et al., *supra* note 41, at 1647.

¹⁰³ MARY PRICE, FAMM, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 10 (June 2018) [hereinafter FAMM REPORT], <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [<https://perma.cc/N6ZB-N97H>].

¹⁰⁴ Danielle Wallace & Xia Wang, *Does In-Prison Physical and Mental Health Impact Recidivism?*, 11 SSM – POPULATION HEALTH 7 (2020), <https://doi.org/10.1016/j.ssmph.2020.100569> (“[I]n-prison physical health has a positive and significant relationship with recidivism: the better one’s health while in prison, the higher their odds of recidivating.”).

¹⁰⁵ *Id.*

of the least likely to be rearrested or return to prison.¹⁰⁶ Specifically, in the context of inmate COVID-19-related lawsuits, district courts granted early release to federal prisoners with violent offense convictions upon recognition that their “medical conditions . . . correspond with a lower risk of recidivism.”¹⁰⁷ In both *United States v. Medlin* and *United States v. Howard*, the courts held that the defendant-inmate’s compromised medical condition defeated the government’s argument that the defendant would pose a danger to the community if released.¹⁰⁸ Hence, the belief that all inmates convicted of violent offenses are violent people who will likely reoffend if released is unwarranted.¹⁰⁹ However, this belief continues to trap some of the “oldest inmates and those with medical conditions who ‘pose a very low safety risk in the community but face exceptionally high health risks in prison.’”¹¹⁰

3. The Misconception that Inmates with Violent Offense Convictions Committed a Crime Involving Violence

The foregoing misconceptions rest on the assumption that inmates with violent offense convictions committed a crime involving violence. This is not always the case. Inmates can have a violent offense conviction even if they never shot or even laid a hand on another person.¹¹¹ These violent offense convictions for nonviolent acts happen in three different ways.¹¹²

¹⁰⁶ FAMM REPORT, *supra* note 103, at 10.

¹⁰⁷ *United States v. Howard*, No. 12-20751, 2020 WL 4812717, at *2 (E.D. Mich. Aug. 19, 2020).

¹⁰⁸ *United States v. Medlin*, No. 3:09-CR-00204, 2020 WL 4274199, at *3,*5 (M.D. Tenn. July 24, 2020) (holding that the defendant’s chronic obstructive pulmonary disease and diabetes increased his vulnerability to COVID-19 and decreased his risk to public safety); *Howard*, 2020 WL 4812717, at *1 (holding that the defendant’s hypertension and diabetes increased his vulnerability to COVID-19 and decreased his risk to public safety).

¹⁰⁹ See Joseph Dole, *Myths About “Violent Offenders” Compromise True Safety*, TRUTHOUT (July 19, 2018), <https://truthout.org/articles/myths-about-violent-offenders-compromise-true-safety/> [https://perma.cc/CZ92-LBX6].

¹¹⁰ Luke Broadwater, *With Coronavirus Spreading, Maryland Gov. Hogan Signs Order for Expedited Release of Hundreds of Prisoners*, BALTIMORE SUN (Apr. 19, 2020, 2:24 PM), <https://www.baltimoresun.com/coronavirus/bs-md-pol-hogan-prisoners-20200419-7mzvooaoxfbyngowb2xdeucrme-story.html> [https://perma.cc/3KJL-QK5V] (quoting Paul DeWolfe).

¹¹¹ Dole, *supra* note 109.

¹¹² See *id.*

First, the felony murder rule, which has been adopted by forty-four states,¹¹³ imposes strict liability for deaths resulting from the commission of a felony.¹¹⁴ For example, if a robbery causes a distressed company manager to suffer from a heart attack and die, the robber can be convicted of first-degree murder despite never intending or knowing that her actions would result in the death of another person.¹¹⁵ Thus, in states that use this rule to convict, there are nonviolent inmates serving sentences for a violent offense.

Second, under the doctrine of accomplice liability, a person can be convicted of a crime that he or she did not personally commit, but rather was committed by someone else.¹¹⁶ Under this doctrine, if a defendant is found to have encouraged the commission of a crime, and either agreed to provide or actually provided assistance in the commission of the crime, the defendant can be convicted for the same crime and subjected to the same sentence as the person who carried it out.¹¹⁷ So, a person can be convicted of murder if she, with an intent to aid in the commission of the crime, simply shouted words of encouragement to the person who does the actual killing.¹¹⁸ Therefore, an inmate can have a

¹¹³ Vaidya Gullapalli, *The Felony Murder Rule as a 'Representation of What's Wrong in Our Criminal Legal System'*, APPEAL (Sept. 23, 2019), <https://theappeal.org/the-felony-murder-rule-as-a-representation-of-whats-wrong-in-our-criminal-legal-system/> [<https://perma.cc/U3VD-VVDA>].

¹¹⁴ The felony murder rule varies state-by-state but most states impose strict liability for any killings that result during the commission of the crime. *Id.*; see also, e.g., *United States v. Johnson*, 151 F. Supp. 3d 1226, 1237 (D.N.M. 2015) (“[A] felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony,’ regardless [of] whether deaths are foreseeable.” (quoting *People v. Stamp*, 2 Cal. App. 3d 203, 210 (Ct. App. 1969))). Although California did away with strict liability after this case was decided, *Stamp* represents the view that is generally accepted in American courts. See Raychel Teasdale, *Accounting for Adolescents’ Twice Diminished Culpability in California’s Felony Murder Rule*, 53 LOY. L.A. L. REV. 307, 314 (2019); Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 77 (1990) (explaining that most states are committed to holding defendants strictly liable).

¹¹⁵ See, e.g., *Stamp*, 2 Cal. App. 3d at 207–08, 210–11 (charging Defendant Stamp with first degree murder and robbery after a company manager of a bank died during the commencement of a robbery).

¹¹⁶ Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1351 (1998).

¹¹⁷ *Hicks v. United States*, 150 U.S. 442, 450 (1893) (holding that a person found to be an accomplice “is equally guilty as if he had actively participated by words or acts of encouragement”).

¹¹⁸ *Id.* at 448 (“[I]f the facts show that he either aided or abetted or advised or encouraged [the person who fired the gun, killing the victim], he is made a participant

violent offense conviction if she assisted in the commission of a violent crime, although she never personally engaged in an act of violence.

Finally, state statutory definitions of “violent crimes” are broadly construed, with some requiring no act of violence at all.¹¹⁹ For example, several states include crimes such as racketeering,¹²⁰ theft,¹²¹ and possession of weapons¹²² in their definitions of violent crimes. Also, in “states like North Carolina and Minnesota drug crimes can be categorized as violent based on the quantity [of the illegal substance] involved or location where [the crimes] are committed.”¹²³ Furthermore, several states classify attempts at committing violent crimes as violent crimes themselves.¹²⁴

As the examples above illustrate, many acts that result in “violent crime” convictions do not necessarily involve violence. Then, by solely focusing on the categorical nature of inmates’ convictions, officials and courts overlook the fact that some inmates they deemed “violent” and a “threat to public safety” did not, in fact, commit an act of violence.¹²⁵

in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed.”)

¹¹⁹ See Pfaff, *supra* note 42; HON. WILLIAM J. MEADE & RANDY S. CHAPMAN ET AL., CRIME AND CONSEQUENCE: THE COLLATERAL EFFECTS OF CRIMINAL CONDUCT 7.3.1 (Massachusetts Continuing Legal Education, Inc. ed., 2013) (“[V]iolent crime is so broad that it will likely include any offense with an allegation of violence, regardless of whether the actual underlying facts supporting the conviction actually involved violence.”).

¹²⁰ See, e.g., GA. CODE ANN. § 16-15-3(1)(A) (West 2019) (defining racketeering activity as a crime of violence); N.J. STAT. ANN. § 2C:43-7.2(d)(18) (West 2013) (same).

¹²¹ See, e.g., MINN. STAT. ANN. § 62A.712(5) (West 2019) (including several acts of theft in its definition of a violent crime); ALA. CODE § 13A-11-70(2) (2021); State v. Dunn, 767 So. 2d 405, 406 (Ala. Crim. App. 2000) (holding that theft in the second-degree was a crime of violence, despite it being an “an act of shoplifting” that involved “no weapon or ‘violent’ act”).

¹²² See, e.g., S.C. CODE ANN. § 16-23-500(A) (2016) (“It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State.”); N.Y. PENAL LAW § 70.02(1)(a) (McKinney 2020) (defining criminal possession of a weapon as a violent offense).

¹²³ Lartey, *supra* note 90; see ALA. CODE § 13A-11-70(2) (2021) (defining “the distribution or manufacture of a controlled substance” as a crime of violence).

¹²⁴ See, e.g., CAL. PENAL CODE § 667.5(c)(12) (West 2020); N.Y. PENAL LAW § 70.02(1) (McKinney 2020).

¹²⁵ Another way in which a nonviolent individual can be serving a sentence for a violent offense not herein discussed would be through a wrongful violent crime conviction.

B. *The Limited Impact and Deadly Effects of Restrictive Early Release Mechanisms*

The COVID-19 pandemic serves as an example of how restrictive early release mechanisms can cost thousands of lives.¹²⁶ Despite allowing for the release of some inmates, the number of releases was insufficient.¹²⁷ Without more expansive action by state officials, inmates as well as prison staff will continue to spread, and succumb to, deadly and contagious diseases like COVID-19.¹²⁸

1. *The Limited Impact of Restrictive Early Release Mechanisms*

Although the purported effect of COVID-19-related release mechanisms was to allow inmates to properly social distance and ultimately mitigate the spread of the virus, they were largely ineffective.¹²⁹ On average, state prisons only experienced a five percent reduction in their populations.¹³⁰ In essence, prisons “releas[ed] almost no one.”¹³¹ Consequently, as of July 2021, over 398,000 inmates had contracted the virus in state prisons nationwide.¹³² This number was likely even higher as there were

¹²⁶ *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/3QTT-FLDU>] (last updated July 1, 2021, 1:00 PM).

¹²⁷ See Garrett, *supra* note 46; Megan Gray, *Maine Prisons Pressured To Release More Inmates, and Information, During Pandemic*, PRESS HERALD (May 3, 2020), <https://www.pressherald.com/2020/05/03/maine-prisons-pressured-to-release-more-inmates-and-more-information-during-pandemic/> [<https://perma.cc/NWJ8-MFRQ>] (“[E]fforts [were] not dramatic enough to prevent more outbreaks and deaths among incarcerated people and corrections employees.”).

¹²⁸ See Amir Vera, *US Could See a ‘Very Deadly December’ with Tens of Thousands of Coronavirus Death To Come, Computer Model Predicts*, CNN HEALTH (Sept. 11, 2020), <https://www.cnn.com/2020/09/11/health/us-coronavirus-friday/index.html> [<https://perma.cc/JK56-RR9N>].

¹²⁹ See, e.g., Emily Widra & Peter Wagner, *While Jails Drastically Cut Populations, State Prisons Have Released Almost No One*, PRISON POL’Y INITIATIVE (May 1, 2020), <https://www.prisonpolicy.org/blog/2020/05/01/jails-vs-prisons/> [<https://perma.cc/C7AT-N9VM>] (noting that the early release of 800 inmates in Iowa only reduced the incarcerated population by 3%).

¹³⁰ *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/V7Q3-9K6R>].

¹³¹ *Id.*; see Speri, *supra* note 68.

¹³² MARSHALL PROJECT, *supra* note 126.

no centralized reporting responsibilities holding prisons accountable.¹³³

Experts and advocates attributed the mechanisms' limited impact to their exclusion of inmates with violent offense convictions.¹³⁴ The number of inmates eligible for early release was greatly reduced when inmates with violent offense convictions were removed from consideration.¹³⁵ For example, the Oklahoma Department of Corrections "identified at least 126 inmates whose medical issues would put them particularly at risk from the pandemic, but that number was reduced to 14 recommendations . . . after removing inmates serving time for violent crimes, sex crimes, and other categories."¹³⁶ Additionally, in Rhode Island, out of 200 inmates nearing the end of their sentences, only 52 remained eligible for release after the "violent" offenders were removed from the list of eligible inmates.¹³⁷ Also, not every "nonviolent" offender deemed eligible for early release was actually released.¹³⁸ But even if they were, we would still have had overcrowded prisons due to the population of inmates with violent offense convictions in state prisons.¹³⁹

2. The Deadly Effects of Restrictive Early Release Mechanisms

Because of the failure to effectively combat overcrowded prison conditions, it was no surprise that prisons became

¹³³ Wojcik & Austin, *supra* note 9, at 47; see Speri, *supra* note 68 ("It's in the interest of the prison systems to pretend these people are not dying from Covid.") (quoting Sharon Dolovich).

¹³⁴ See Garrett, *supra* note 46.

¹³⁵ See quote cited *supra* note 127.

¹³⁶ Chris Polansky, *Board Recommends Special Medical Parole for 12 State Inmates*, PUB. RADIO TULSA (May 13, 2020), <https://www.publicradiotulsa.org/post/board-recommends-special-medical-parole-12-state-inmates#stream/0> [<https://perma.cc/4CWP-KZ8C>].

¹³⁷ Reynolds, *supra* note 48.

¹³⁸ See, e.g., Polansky, *supra* note 136 (One Oklahoma parole board member voted against releasing an inmate convicted of a nonviolent drug crime because "the 300 grams of methamphetamine' involved in that inmate's case . . . 'outweigh[ed] his medical condition.'") (quoting Allen McCall); Justin Jouvenal, *Suffering from Cancer and Diabetes, a Virginia Inmate Died of Covid-19 Just Months Before His Release Date*, WASH. POST (Oct. 2, 2020, 10:34 AM), https://www.washingtonpost.com/local/public-safety/virginia-prison-covid-outbreak/2020/10/02/8e7b4798-03fd-11eb-a2db-417cddf4816a_story.html (describing that the sixty-seven-year-old inmate suffering from lung and liver cancer, diabetes, and hepatitis C had less than a year to serve on nonviolent charges yet was denied early release).

¹³⁹ See Herskind, *supra* note 1 (explaining that states' releases were "not even a drop in the bucket" compared to the tens of thousands of inmates who remain behind bars).

epicenters of the pandemic.¹⁴⁰ States reported thousands of inmate COVID-19-related deaths.¹⁴¹ Hundreds of these deaths were in states that had abolished the death penalty.¹⁴² Basically, in light of the pandemic, states' unfounded public safety fears drove their implicit approval of death sentences, albeit for crimes that never called for such severe and extreme punishment.¹⁴³ In fact, the Supreme Court has repeatedly held that the death penalty for crimes not resulting in the death of another is "excessive" and "disproportionate" in violation of the Eighth Amendment.¹⁴⁴ However, due to states' limited efforts to protect their inmates, even inmates convicted of nonviolent offenses faced death sentences.¹⁴⁵

Moreover, in addition to being excessively punitive, these non-court-ordered death sentences were "barbaric."¹⁴⁶ In a New Jersey state prison, Tiffany Mofield passed out in a locked shower after begging for help because she could not breathe.¹⁴⁷ By the time

¹⁴⁰ Speri, *supra* note 68; Eric Levenson, *Prison Inmates Are Twice as Likely To Die of Covid-19 than Those on the Outside, New Report Finds*, CNN (Sept. 3, 2020, 10:35 AM), <https://www.cnn.com/2020/09/02/us/prison-coronavirus-clusters-report/index.html> [<https://perma.cc/VK4U-JKZZ>] ("[P]risons have been the source of some of the country's largest Covid-19 outbreaks.").

¹⁴¹ MARSHALL PROJECT, *supra* note 126.

¹⁴² *Id.*; *States with and Without the Death Penalty – 2021*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Sept. 15, 2021).

¹⁴³ *See, e.g., First Conn. Inmate Dies of Coronavirus: DOC*, NBC CONN. (Apr. 13, 2020), <https://www.nbcconnecticut.com/news/coronavirus/first-conn-inmate-dies-of-coronavirus-doc/2255025/> [<https://perma.cc/6YA8-4XD3>] (reporting that a Connecticut state prison inmate serving a two-year sentence for possessing a firearm died from COVID-19).

¹⁴⁴ *Enmund v. Florida*, 458 U.S. 782, 796–97 (1982) (holding that the death penalty for the crime of armed robbery is unconstitutional); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 16 (2006).

¹⁴⁵ *See, e.g., Jeff Neiburg, 10th Delaware Prisoner Dies from COVID-19, Other Complications*, DEL. NEWS J. (Aug. 11, 2020, 8:14 PM), <https://www.delawareonline.com/story/news/2020/08/11/delaware-prisoner-dies-covid-19-other-complicationscoronavirussussexcorrectionalinstitution/3350433001/> (reporting that sixty-one-year-old Delaware state prison inmate, Fred J. Clanton, was serving a three-year sentence for drug dealing when he succumbed to the virus).

¹⁴⁶ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("[T]he Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed.").

¹⁴⁷ Alice Speri, *A Woman Died of COVID-19 in a New Jersey Prison After Begging To Be Let Out of a Locked Shower*, INTERCEPT (May 11, 2020, 1:56 PM), <https://theintercept.com/2020/05/11/new-jersey-prisons-coronavirus-death/> [<https://perma.cc/FL8V-HPAV>].

officers finally called an ambulance, it was too late.¹⁴⁸ Ms. Mofield, at just forty-three years old, died from COVID-19.¹⁴⁹ Inmates—regardless of their categorical conviction—suffered and will continue to suffer disproportional and cruel death sentences if states do not take greater action to reduce their prison populations.¹⁵⁰

Additionally, the deadly consequences stemming from ineffective state action affected not only inmates, but also prison staff.¹⁵¹ Over 114,000 prison staff contracted COVID-19 and over 200 died from it.¹⁵² The consequences did not stop there.¹⁵³ Unlike the inmates, prison staff come and go on a daily basis.¹⁵⁴ As a result, COVID-19 outbreaks in prisons “act[ed] as a reservoir of illness to the wider community.”¹⁵⁵ Simply put, without effective release mechanisms, states will continue to jeopardize public safety.¹⁵⁶

III. EXTENDING EARLY RELEASE ELIGIBILITY THROUGH LEGISLATION

States must stop excluding a majority of their prison populations—many of whom do not pose a risk to public safety—from early release eligibility.¹⁵⁷ To successfully combat similar crises in the future, states must enact inclusive early release

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Nation's Criminal Defense Bar Re-emphasizes the Grave Risk of COVID-19 in Jails and Prisons, Calls for Immediate Action*, NACDL (July 15, 2020), <https://nacdl.org/newsrelease/NACDLCallsforActionreCOVIDinPrison> [<https://perma.cc/XM9D-BAFE>] (“[L]eaving incarcerated people in prisons and jails during this crisis is not only cruel and unusual punishment, it may also be a death sentence.”).

¹⁵¹ MARSHALL PROJECT, *supra* note 126.

¹⁵² *Id.*

¹⁵³ *See Jason Meisner & Annie Sweeney, Inmate Advocates File Series of Lawsuits Seeking Potential Release of Thousands from Illinois Prisons*, CHI. TRIB. (Apr. 2, 2020, 5:07 PM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-idoc-releases-lawsuits-20200402-3rotshn6p5hqfgpxkrhiyj4x6m-story.html> (“If infection spreads, staff members . . . could unsuspectingly carry the virus back to the communities surrounding the prisons.”).

¹⁵⁴ Montoya-Barthelemy et al., *supra* note 45, at 889.

¹⁵⁵ *Id.* at 890.

¹⁵⁶ Herskind, *supra* note 1.

¹⁵⁷ Speri, *supra* note 68 (“We need governors and prosecutors and judges . . . to act immediately and dramatically to reduce jail and prison populations to stop the spread of Covid-19, not only in jails and prisons, but in the broader community.”) (quoting Udi Ofer); Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 450–51 (2012).

legislation to reduce their prison populations. By enacting legislation based on well-established facts, states can effectively protect inmates and the public.¹⁵⁸ These facts, as laid out in Part II Section A, point to enacting legislation making all inmates eligible for early release, and calling for the release of those—regardless of their status as a “violent” or “nonviolent” offender—who do not pose a risk to public safety.

Despite factual findings favoring their release, legislators have long refused to include inmates with violent offense convictions in their early release policies out of fear of public backlash.¹⁵⁹ Therefore, some inmates with violent offense convictions, such as “battered spouse[s] who murdered after years of abuse . . . are often kept imprisoned not because of the safety risk they pose, but because of the political risk they pose to those who might release them.”¹⁶⁰ Even in the midst of a deadly pandemic, legislators put their political interests before the lives of inmates.¹⁶¹ Consequently, the deaths of inmates like Ms. Farrell were “the direct result of policy failures by the leaders . . . charge[d] with protecting health and safety.”¹⁶²

New Jersey was the only state to pass legislation aimed at releasing inmates early during the pandemic to ensure the safety of its inmates.¹⁶³ Like many other states, New Jersey recognized the need to protect its prisoners because “the inability of inmates to quarantine or practice social distancing creates a higher risk to

¹⁵⁸ Dora Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANN. REV. PUB. HEALTH 325, 327 (2012) (“[T]he incarcerated have far more health problems than does the general population.”).

¹⁵⁹ Jones, *supra* note 82 (noting that “almost all of the major criminal justice reforms passed in the last two decades explicitly exclude people accused and convicted of violent offenses”); Klingele, *supra* note 157, at 451 (“Because political considerations weigh heavy on lawmakers . . . and because releasing murderers or sex offenders or others convicted of violent offenses is seen as politically risky, lawmakers are unlikely to release the individuals who are actually least likely to recidivate, favoring instead those more likely to re-offend, but in ways that are less controversial or potentially dangerous.”).

¹⁶⁰ Klingele, *supra* note 157, at 450–51.

¹⁶¹ See *supra* Section I.C. (explaining the almost unanimous decision among states to exclude inmates convicted of violent crimes from early release eligibility).

¹⁶² Stephanie DiCapua Getman, *Policy Failures in Corrections, Attaching Strings to Federal Aid, What To Watch Now*, ARNOLD VENTURES (May 8, 2020), <https://www.arnoldventures.org/newsletter/policy-failures-in-corrections-attaching-strings-to-federal-aid-what-to-watch-now/> [<https://perma.cc/N4PY-3CLK>].

¹⁶³ S. NO. 2519, 29th Leg., at 1 (N.J. 2020) (synopsis of the Bill says that it “[r]equires public health emergency credits to be awarded to certain inmates and parolees during public health emergency; prohibits contact with victim upon release of inmate awarded credits.”).

their lives.”¹⁶⁴ As a result, the New Jersey Senate introduced Bill No. 2519, which initially permitted the early release of inmates with less than a year left on their sentences regardless of their categorical conviction as either a “violent” or “nonviolent” offender.¹⁶⁵

Yet, shortly after being introduced, “[t]he committee amended the bill to provide that an inmate or juvenile [was] not eligible to receive public health emergency credits if the inmate or juvenile [was] serving a sentence for murder or aggravated sexual assault.”¹⁶⁶ This provision, which reduced the number of inmates eligible for release by half, is in stark contrast to established facts about who can be released without jeopardizing public safety.¹⁶⁷ In particular, “[n]early every study ever conducted on the subject of recidivism rates as they relate to crime categories . . . shows that people convicted of murder have the lowest recidivism rates.”¹⁶⁸ Moreover, “there is no evidence that sex offenders are unable to control their actions.”¹⁶⁹ Ultimately, by overlooking these facts and yielding to political pressure, New Jersey hampered its ability to effectively reduce its state prison population and save lives.

On the other hand, the New York State Senate recently proposed a Bill that is grounded in facts—not misconceptions or political fears. New York Senate Bill S2144, if passed, would allow for *all* inmates over the age of fifty-five who served at least fifteen

¹⁶⁴ Senate Commerce Committee Statement to Senate Bill No. 2519 with Committee Amendments, S. NO. 2519, 29th Leg., at 1 (N.J. July 23, 2020).

¹⁶⁵ Assembly Budget Committee Statement to Senate Bill No. 2519 with Committee Amendments (Third Reprint), S. NO. 2519, 29th Leg., at 3 (N.J. Sept. 22, 2020) (“As introduced, only an inmate or juvenile who was deemed a repetitive, compulsive sex offender was ineligible to receive credits.”).

¹⁶⁶ *Id.*

¹⁶⁷ Blake Nelson, *Thousands of N.J. Inmates Could Be Released Early in COVID Crisis Under Bill Senate Just Passed*, NJ.COM (Aug. 27, 2020, 5:33 PM), <https://www.nj.com/coronavirus/2020/08/thousands-of-nj-inmates-could-be-released-early-in-covid-crisis-under-bill-senate-just-passed.html> [https://perma.cc/WM4E-5PAU] (explaining that as of August 2020, the predicted number of inmates eligible for release under the Bill was close to 4,000); Blake Nelson, *Murphy Signs Bill To Release Thousands of N.J. Prisoners Early Beginning the Day After Election Day*, NJ.COM (Oct. 19, 2020, 7:35 PM), <https://www.nj.com/news/2020/10/murphy-signs-bill-to-release-thousands-of-nj-prisoners-early-beginning-the-day-after-election-day.html> [https://perma.cc/9KTD-R44N] (explaining that as of October 2020, the predicted number of inmates eligible for release under the Bill dropped to around 2,000).

¹⁶⁸ Dole, *supra* note 109.

¹⁶⁹ Wells & Motley, *supra* note 70, at 157.

years of their sentence to be parole eligible.¹⁷⁰ The Bill maintains that once eligible the inmates shall be released, so long as the inmates do not pose a significant risk to public safety.¹⁷¹ It explicitly recognizes that “[t]he number of older inmates in our prison system is rising every year even as the total inmate population is falling.”¹⁷² In addition, the Bill acknowledges that “[c]rimes are largely committed by young people” and that “[o]lder inmates who have served long sentences present the lowest risk of recidivism of any other class of inmates.”¹⁷³ The New York Senate’s ability to focus on enacting legislation based on factual data should serve as an example for legislators nationwide when it comes to protecting their inmates.

Still, New York Senate Bill S2144 is not without its problems. First, the Bill does not recognize the fact that even some inmates convicted of violent crimes under the age of fifty-five pose a very low risk to public safety. For example, Michael Flournoy, mentioned above, was a changed man by the age of just forty-three.¹⁷⁴ Second, the Bill does not call for the release of some medically vulnerable inmates, who in addition to the elderly, are at a greater risk of facing a death sentence from diseases like COVID-19 and pose little risk to public safety.¹⁷⁵ In conclusion, legislators following New York’s fact-based legislation should look beyond permitting the early release of non-threatening older inmates to the release of all inmates who do not pose a risk to public safety.

CONCLUSION

Incarcerating people in confined prison conditions during the spread of a deadly and highly contagious virus is unduly punitive, especially when subjecting inmates to such confinement is unnecessary. Deadly diseases do not discriminate based on an

¹⁷⁰ S.B. 2144, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

¹⁷¹ *Id.*

¹⁷² Sponsor Memo of Sen. Brad Hoylman, S.B. 2144, 2019–2020 Leg., Reg. Sess., (N.Y. 2019).

¹⁷³ *Id.*

¹⁷⁴ Mahdawi, *supra* note 90; *see* Lartey, *supra* note 90 (“[G]rowing research . . . indicates [that] most people ‘age out’ of violent crime after their 20s and 30s . . .”).

¹⁷⁵ *See* Letter from the Colorado Criminal Justice Reform Coalition et. al., to Governor Polis (May 8, 2020), <https://aclu-co.org/wp-content/uploads/2020/05/Coalition-letter-to-Governor-Polis-re-COVID-19-and-CO-Prisons-5-8-2020-FINAL-1.pdf> (“We cannot keep elderly and medically vulnerable Coloradans incarcerated in prisons that are likely to become their death traps.”).

inmate's conviction as a "nonviolent" or "violent" offender, and neither should states. If states continue to ignore the facts that debunk their rationale for excluding inmates with violent offense convictions, they will continue to implicitly authorize disproportionate death sentences inside, as well as outside, their prison walls.